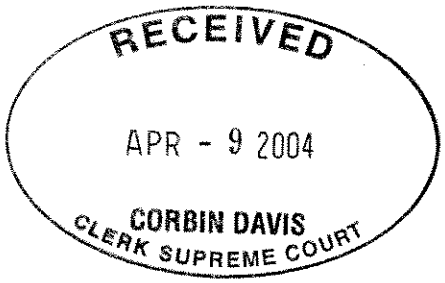
April Sixth, 2004

Michigan Supreme Court Clerk
525 W. Ottawa St. 2nd Floor
G. Mennen Williams Bldg.
Lansing, Mich 48933



RE: ADM File No. 2003-04

To all those concerned,

I would like to comment on the proposed addition of MCR 6.428 "Reissuance of Judgment" and proposed amendment of MCR 6.508 to include subsection (F), "Restoration of Appeal by Right".

I believe that these proposed changes and additions are generally a good idea. However, in the two rules that are the subject of my comments, there is an instance of ineffective assistance of counsel that has been overlooked and should by all means be added, in order to cure errors which are not the fault of many defendants, but those of counsel.

I speak of those errors that occur at sentencing that involve retained or appointed counsel's failure to file the Claim Of Appeal and Appointment Of Counsel form that is provided by the sentencing court in accordance with MCR 6.425(F)(3), which causes an appeal of right to be lost if it is not filed within 42 days of the judgment. MCR 6.425(F)(1)(b).

I have taken the liberty of inserting an example of what I believe should be added to your proposals. (The underlined, bold-printed portions).

** Comment on the proposed addition of MCR 6.428 **

RULE 6.428. REISSUANCE OF JUDGMENT.

If the defendant did not appeal within the time allowed by MCR 7.204(A)(2) and demonstrates that the attorney or attorneys retained or appointed to represent him or her **at sentencing or** on direct appeal from the judgment either **failed to file the Claim Of Appeal and Appointment Of Counsel form provided by the sentencing court in accordance with MCR 6.425(F)(1)(b), and (F)(3), when the record clearly indicates that counsel has agreed to do so on defendant's behalf**, disregarded the defendant's instruction to perfect a timely appeal of right, or otherwise failed to provide effective assistance, and, but for counsel's deficient performance, the defendant would have perfected a timely appeal of right, the trial court shall issue an order restarting the time in which to file an appeal of right.

** Comment on the proposed addition of MCR 6.508(F) **

(F) Restoration of Appeal by Right. If the motion seeks a renewed opportunity for an appeal of right from a judgment of conviction and sentence that the defendant did not appeal within the time allowed by MCR 7.204(A)(2) and demonstrates that the attorney or attorneys retained or appointed to represent the defendant **at sentencing, or** on direct appeal from the judgment either

(1) failed to timely file the Claim Of Appeal and Appointment Of Counsel form provide by the Sentencing Court in accordance with MCR 6.425(F)(1)(b) and(F)(3), when the record clearly indicates that counsel has agreed to do so on defendant's behalf; or

(2) disregarded the defendant's instruction to perfect a timely appeal of right; or

(3) otherwise failed to provide effective assistance and, but for counsel's deficient performance, the defendant would have perfected a timely appeal of right, the trial court shall issue an order restarting the time in which to file an appeal of right.

** Case background **

My reasons for asking that this type of counsel error be considered and included is due to the following.

During my sentencing on November 14 1995, I was sentenced to serve natural life without parol, for allegedly aiding and abetting a felony murder. (MCL 750.316b). During these proceedings, my retained trial counsel, who also represented me at sentencing, promised on the record that he would take my appellate forms and timely file them with the proper office on my behalf. (Judicial Aide) He neglected to do so within the allowed 42 days however, and as a result, caused my appeal of right to be lost. Please see People v Tull, 460 Mich 857-859; 595 NW.2d 840-842 (1999), which is attatched for your convenience.

After discovering counsel's error, I contacted an attorney for advice. The attorney sent me the claim of appeal/appointment of counsel form, and instructed me to sign and send it to Judicial Aide immediately, which I did.

The trial court then appointed the State Appellate Defender Office (SADO) to represent me on appeal. SADO, however, also neglected my legal matters and failed to timely file the application for leave to appeal in the Michigan Court of Appeals, causing it to be dismissed for lack of jurisdiction.

A motion for rehearing was filed, relying on People v Brazil, 456 Mich 1227; NW.2d (1998), in which SADO admitted their own ineffectiveness. This too was rejected with Justice White joining in the denial, but recognizing that "should defendant apply for leave to appeal to the Supreme

Court, there is good reason for the Supreme Court to treat this case as it did People v Brazil" (citation omitted).

An application for leave to appeal was then filed in the Michigan Supreme Court, and denied in a three to three tie. The seventh Justice, (Young) did not participate, as he was one of the Justices that denied leave and reconsideration in the lower court.

In the lengthy dissent, Justice Kelly, joined by Justices Cavanagh and Brickley, stated that my case should be remanded to the Court of Appeals, and that it should review my issues on the merits because of the ineffectiveness of trial and appellate counsel. People v Tull, supra.

Rehearing was sought and denied in the Michigan Supreme Court, after which I sought the reinstatement of my Right to Appeal in the Federal Court, Eastern District, Southern Division, via a writ of Habeas Corpus.

This writ was dismissed without prejudice, for failure to exhaust an alleged state remedy which was still arguably available, even though Michigan Supreme Court Justices Kelly, Cavanaugh and Brickley stated in their earlier dissent that "The fact that defendant has no right to appointed counsel, among other distinctions, renders this supposed availability of relief under MCR 6.500 an unlikely and palliative remedy at best".

I then sought the assistance of an attorney to prepare and file the MCR 6.500 motion, and with friends' financial support, we retained an attorney to handle the matter. Unfortunately, this attorney didn't so much as even visit me to discuss the case, and after thirty two months of neglect, I dismissed him from the case in late December of 2003, but the damage was already done. Due to his errors, I will never be allowed to present any issue to the Federal Courts (if that becomes necessary) due to the holding in Palmer v Carlton, 276 F.3d 777 (6th Cir 2002).

Palmer holds that when state remedies are unexhausted, a petitioner has 30 days to file the unexhausted claim in the state court, and 30 days to return to the Federal court for review after the claim is exhausted. That time had obviously passed in my case a long time ago —— on my last attorney's watch.

That is where I now stand. It is disturbing that I and my legal matters have been treated with such indifference in a country that prides itself on Due Process and the equality of treatment under the law.

I may forever be unable to appeal my claims in any meaningful manner,

and be condemned to spend the rest of my natural life in prison for a crime I am not guilty of.

I began with the Constitutional Right to an Appeal, only to be reduced to beggary, through a MCR 6.500 motion.

I should not be denied my Right to Appeal due to the atrocious bunglings of attorney after attorney, for failing to follow simple rules which they have robotically done, time and again.

Michigan Supreme Court Justice Corrigan, in her statement, said that MCR 6.500 was the proper arena for a case with my circumstances, and that "Where good cause and actual prejudice can be shown, defendant will not be precluded from having his claims addressed".

I vehemently dissent. The Michigan Constitution gives me the Right to an Appeal, which is also Federally supported via the 14th Amendment of the United States Constitution. I have not knowingly and voluntarily waived this right at any time, in any manner. In fact, I have shown the opposite...that I wish to have my Constitutional Right To Appeal.

I shouldn't have to show cause and prejudice to have my claims addressed. I have the right to have a reasoned decision on my claims of error. And to paraphrase Justices Kelly, Cavanaugh and Brickley, a 6.500 motion is a supposed remedy which is unlikely and palliative at best.

For the above reasons, I ask that my circumstances be included in the proposed rules MCR 6.428, and MCR 6.508(F).

Sincerely,

Christopher L. Tull

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cc: Michigan Supreme Court
File of CLT

to counsel, and (4) whether, in these circumstances, the defendant's second guilty plea was a knowing and voluntary plea.

BURNS v PEPSI COLA METROPOLITAN BOTTLING COMPANY, No. 112938. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(F)(1). Court of Appeals No. 209797.

TERRY v AFFUM, Nos. 114097, 114098. In lieu of granting leave to appeal, the Court of Appeals analysis that MCL 722.26c; MSA 25.312(6c) is limited to third-party actions for custody and does not confer standing upon third parties to seek visitation is affirmed. The result reached by the Court of Appeals however is vacated. In "appropriate cases," visitation may be awarded to a third party, not based on the third party's standing to seek visitation, but on a circuit court's determination of the child's best interests. See MCL 722.27(1)(b); MSA 25.312(7)(1)(b); *Bowie v Arder*, 441 Mich 23, 48-49 (1992); *Ruppel v Lesner*, 421 Mich 559, 565-566 (1984); *Sirovey v Campbell*, 223 Mich App 59 (1997). The case is remanded to the Court of Appeals for consideration of whether this case is such an appropriate case. If the Court of Appeals determines this was such a case, it is to then address the remaining issues raised in that Court but not addressed in its opinion. Jurisdiction is not retained. Reported below: 233 Mich App 498.

PEOPLE v CRUZ, No. 114217. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for reconsideration whether defendant adequately preserved this evidentiary question as required by MRE 103(a)(2). MCR 7.302(F)(1). Court of Appeals No. 209273.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

Reconsideration denied September 29, 1999.

KELLY, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v MCDUFFIE, No. 114757. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted, and the case is to be given expedited consideration pursuant to MCR 7.213(C). MCR 7.302(F)(1). Court of Appeals No. 218304.

Leave to Appeal Denied June 22, 1999:

DYKSTRA v DEPARTMENT OF TRANSPORTATION, No. 110981; Court of Appeals No. 192187.

PEOPLE v CHARLIE WILLIAMS, No. 112810; Court of Appeals No. 206971.

KELLY, J. I would remand this case pursuant to *People v Ginther*, 390 Mich 436 (1973).

PEOPLE v MURRAY, No. 112814; Court of Appeals No. 196256.

CAVANAGH, J. I would grant leave to appeal.

PEOPLE v ERDMAN, No. 112887; Court of Appeals No. 209643. Reconsideration denied August 31, 1999.

PEOPLE v CHAPMAN, No. 112982; Court of Appeals No. 200418.

CAVANAGH and KELLY, JJ. We would remand this case to the Court of Appeals for consideration as on leave granted.

UNDERWOOD v METAMORA TOWNSHIP, No. 113011; Court of Appeals No. 209645.

CAVANAGH, J. I would remand this case to the Court of Appeals as on leave granted.

HASKE v TRANSPORT LEASING, INC No 1, No. 113070; Court of Appeals No. 211160. Reconsideration denied August 31, 1999.

PEOPLE v DEKORTE, No. 114161; reported below: 233 Mich App 564.

WEAVER, C.J., and YOUNG, J. We would grant leave to appeal.

JOHNSON v SMEDSTAD, No. 114731; Court of Appeals No. 218560.

CAVANAGH and KELLY, JJ. We would remand to the trial court for reconsideration of defendant's motion to change domicile. Under the facts of this case, the visitation schedule proposed by the Friend of the Court is a realistic alternative to weekly parenting time that could provide an adequate basis for preserving and fostering the noncustodial parent's relationship with the child. Court of Appeals No. 218560.

Leave to Appeal Granted June 23, 1999:

PEOPLE v WYNGAARD, No. 111212. The issue is limited to whether the admission into evidence of defendant's prior administrative guilty plea violated his Fifth Amendment rights. The Prosecuting Attorneys' Association of Michigan and the Criminal Defense Attorneys of Michigan and other persons or groups interested in the determination of the question are invited to file briefs amici curiae. Reported below: 226 Mich App 681.

Leave to Appeal Denied June 23, 1999:

PEOPLE v TULL, No. 113211. Leave to appeal is denied, there being no majority in favor of granting leave to appeal. Court of Appeals No. 204999.

CORRIGAN, J. I would deny leave to appeal without prejudice to defendant seeking relief pursuant to MCR 6.500 *et seq.*

The Court of Appeals did not err in denying defendant the relief sought. The language in MCR 7.205(F)(3) operates as a jurisdictional limitation on the ability of the Court of Appeals to grant leave where the application is filed more than twelve months after entry of judgment. The provisions for postappeal relief found in subchapter 6.500 of the court rules were created precisely for cases such as this. Where good cause and actual prejudice can be shown, defendant will not be precluded from having his claims addressed. Moreover, without additional factual development, a finding by this Court that defendant lost his appeal of right due to ineffective assistance of counsel is purely speculative.

WEAVER, C.J., and TAYLOR, J. We join in the statement of Justice CORRIGAN.

KELLY, J. I would remand this case to the Court of Appeals for reconsideration as on leave granted. In the particular circumstances of this case, it appears that defendant has lost his chance to appeal solely as the result of ineffective assistance of counsel.

Defendant was convicted by jury of first-degree (felony) murder and sentenced to life in prison on November 14, 1995. After imposing sentence, the trial court advised him of his right to appeal. The facts indicate that the court clerk gave defendant a form. However, the language of the form cautions the signatory that the form is merely a notice, and that the request for appointment of counsel still must be filled out and returned to the court.

At the time defendant received the form, his trial counsel told the court:

> Your honor, Mr. Tull acknowledges receipt of his appellate rights. In fact, he is signing them on my behalf so I can bring them to judicial aid for him.
>
> What we would request, your Honor, is [sic] the Court would be so kind to recommend that the State Appellate Defenders Office be recommended in this appeal.

The statement constituted a promise by trial counsel that he would see that appellate counsel was timely requested. Unfortunately, counsel never followed through on his promise.

As a result, defendant missed the 42-day deadline to request counsel under MCR 6.425(F)(1)(b), 7.204(A)(2)(c).[1] Only after defendant learned of this failure, some 100 days after sentencing, did he file a request for counsel. The circuit court then appointed the State Appellate Defender's Office to represent him, using the combined appointment/claim of appeal form that follows the provisions of MCR 6.425(F)(3).

The Court of Appeals dismissed defendant's claim of appeal as untimely because of his failure to request counsel as required under the court rules. The dismissal order was entered in December 1996, more than twelve months after the November 1995 sentencing. Thus defendant also found himself past the twelve-month limit for filing an application for leave to appeal. MCR 7.205(F)(3).

The April 1996 order appointing the State Appellate Defender's Office included an order for trial and sentencing transcripts. Later that month, four additional volumes were requested. Finally, in December 1996, the State Appellate Defender's Office requested preparation of the voir dire transcript. This transcript was not received by the circuit court until June 17, 1997. As a result, counsel did not file a delayed application to appeal until July 24, 1997, well past the twelve-month limit under MCR 7.205(F)(3). On June 15, 1998, the Court of Appeals dismissed the application for leave for lack of jurisdiction, stating that it was not timely under MCR 7.205(F)(3). Also, defendant had not established that either of the exceptions set forth in MCR 7.205(F)(4) applied to the instant action.

[1] Given the comments by trial counsel and his subsequent inaction, it can scarcely be termed "speculation" that defendant lost his appeal of right because of ineffective assistance.

It is true that the court rules must be enforced, and relief cannot be granted to everyone who runs afoul of a rule. However, the deadlines contained within the rules must be read together with MCR 1.105 that requires the rules be construed to secure the just determination of every action.

In the instant case, defendant has effectively been denied any right to an appeal of his conviction and mandatory life sentence through no fault of his own.[2] Trial counsel's initial failure was followed by the State Appellate Defender's failure to file a prophylactic application for leave to appeal when the first untimely "claim" was pending in the Court of Appeals. Strict adherence to the court rule deadline here fosters an unjust result that not only violates the letter of MCR 1.105, but also the spirit of the rules in general.

The three justices who would deny leave to appeal claim that MCR 7.205(F)(3) acts as a jurisdictional limitation on the ability of the Court of Appeals to grant leave here. However, this Court has previously waived the strict filing requirements when justice warranted it. *People v Brazil*, 456 Mich 1228 (1998). Under the unique circumstances of this case, such a result is warranted.

Therefore, I would remand this case to the Court of Appeals for consideration as on leave granted.

BRICKLEY and CAVANAGH, JJ. We join in the statement of Justice KELLY.

Reconsideration denied September 29, 1999.

CAVANAGH and KELLY, JJ. We would grant reconsideration.

Leave to Appeal Denied June 25, 1999:

PEOPLE v HIGGINS, No. 113267; Court of Appeals No. 211301.

KELLY, J. I concur in the denial of leave to appeal but wish to observe that the defendant is entitled by MCR 6.508(D) to file a motion for relief from judgment, claiming that ineffectiveness of appellate counsel fulfills the good cause requirement of the court rule.

Summary Disposition June 29, 1999:

PEOPLE v DONALD TAYLOR, No. 113384. In lieu of granting leave to appeal, the order of the Court of Appeals is reversed and remanded for consideration of the merits of the application. MCR 7.302(F)(1). For purposes of the twelve-month deadline, defendant's application was due in the Court of Appeals on April 11, 1998. Because April 11, 1998, fell on a Saturday, the

[2] The fact that defendant has no right to appointed counsel, among other distinctions, renders the supposed availability of relief under MCR 6.500 an unlikely and palliative remedy, at best.